NRS
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NEWSLETTER

HOW DO YOU FIX A PLAN DOCUMENT ERROR?

Mistakes happen, but when they involve the legal documents that officially describe the terms and conditions of the plan, fixing them can involve a lot more than meets the eye.

The reason for the complication has to do with the basic requirement set forth in ERISA that a tax qualified retirement plan must be in writing and that the written document must be available for review by participants and other interested parties. The IRS and Congress has developed a series of rules for adopting and amending formal plan documents, including the timing of the amendment and, in some cases, the need to notify participants of the pending change in advance. Some of these rules can come into play in cases where someone innocently checks a wrong box or types the wrong number when preparing a formal plan document.

Amendment Rules

The **first rule** says that an employer can amend a plan retroactively, as long as the effective date of the plan amendment occurs during the plan year for which the amendment is effective. For example, a calendar year plan can be amended effective January 1, 2010 as long as the amendment is adopted by December 31, 2010.

A **second rule** concerns the content of the amendment. The amendment may not decrease anyone's accrued benefit. Related to this rule is the requirement that a pension plan may not be amended to provide for a significant reduction in the rate of *future* benefit accrual unless participants receive prescribed advance notice.

Finally, the rules for "self correcting" errors in operating retirement plans generally do not extend to plan document amendments.

Some Amendment Correction Examples

Let's suppose that when a 401(k) plan document was being restated, the eligibility requirements (which had been 3 months of service) are mistakenly changed to require a Year of Service.

If this restatement is effective January 1, 2010 for a calendar year plan, the mistake is easily repaired. An amendment is prepared effective January 1, 2010 and adopted on October 4, 2010 changing the requirement back to 3 months of service. Note that (a) the amendment does not reduce anyone's accrued benefit, (b) the amendment was adopted in the year in which it is effective, and (c) no advance participant notice was required. Note that if the mistake was not discovered until 2011, the opportunity for a quick and easy fix is gone.

As a second example, suppose that a defined benefit pension plan document is being restated and the vesting provision is inadvertently changed from 100% after five years of service to 100% after three years of service. Since the change did not reduce anyone's benefit, there was no need for an advance notice and as long as the restatement was adopted during the plan year in which it was effective, there is no timing violation. However, if an amendment is prepared to correct the error by changing full vesting from three years to five years, it violates the rule of reducing accrued (vested) benefits.

The Safe Solution

The IRS has repeatedly rejected the notion that an employer can simply cancel a plan provision that is alleged to be a mistake and create a second "correct" document to replace the original.

The safe correction of a document mistake that is consistent with available guidance is to prepare a correcting amendment and submit the matter to the IRS for their review and approval under the "Voluntary Correction Program with Service Approval (VCP)." This procedure involves a submission fee plus the expenses associated with the preparation of the submission and interaction with the IRS.

FEE DISCLOSURE RULES ARE FINALLY PUBLISHED

After a two and a half year period involving two Administrations and both political parties, fee disclosure

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rules for those who provide and receive retirement plan services are finally a reality. Effective July 16, 2011, the Department of Labor issued what they call an "interim final regulation," that is subject to change once DOL receives comments from the public. The rules followed the earlier proposed rules, with some modifications. For example, a contract or arrangement between a plan and a service provider who receives remuneration from the plan need not be in writing, according to the regulations. The new regulation requires certain parties who provide services to retirement plans for direct or indirect compensation in excess of $1,000 to provide written descriptions of the services to be provided, what compensation is expected to be received, and how it is paid. Failure to provide this information can result in the financial arrangement with the plan being deemed a prohibited transaction that must be reversed, triggering a penalty tax for the service provider.

Less than 25% of NRS' business will be affected by the regulation. This business primarily involves 401(k) plans with participant directed accounts whereby NRS receives indirect remuneration from the financial institutions that provide the investment platform and recordkeeping. As a matter of good business practice, NRS has disclosed arrangements of this nature to clients. As always, NRS will make certain that our practices continue to conform to all applicable regulatory requirements.

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